RECORD AND BRIEFS

No. 16-1276

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IN THE

Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,

Petitioner,

v.

PAUL SOMERS,

Respondent.

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The Chamber's members have a strong interest in the application of the "whistleblower" provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act" or "Act") in accordance with the terms of the statute and the purposes of the Act, and in the speedy dismissal of whistleblower retaliation claims that fall outside the Act's scope. Meritless claims and expanding litigation costs have a direct impact on the viability, growth, and survival of businesses nationwide.

The interpretation of the Dodd-Frank Act espoused by the Ninth Circuit in this case would greatly expand the number of employees authorized to pursue the enhanced

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1. Pursuant to Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no party or party's counsel authored this brief in whole or in part. And no party, party's counsel, or other person other than *Amicus Curiae*, its counsel, and its members made a monetary contribution intended to fund this brief's preparation or submission.

remedies of the Act, and the period of time in which they may sue for alleged retaliation, without yielding the law-enforcement benefits Congress intended when it enacted a "bounty" and heightened protections for persons who complain to the SEC. The carefully crafted procedures established in 2002 in the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act") would become largely moot and obsolete under the Ninth Circuit's interpretation, depriving Chamber members of the limitations and protections established by that earlier law.

SUMMARY OF THE ARGUMENT

The question presented in this case is whether an individual who does not meet the definition of "whistleblower" in the Dodd-Frank Act can bring a cause of action under the Act's anti-retaliation provisions. The language of the Act is clear that only a "whistleblower"—defined in the statute as an individual who provides information "to the Commission"—is protected by the anti-retaliation provisions of the Act. 15 U.S.C. § 78u-6(a)(6), (h)(1). Yet, Respondent is asking the Court to expand the meaning of "whistleblower" as used in the anti-retaliation provisions by striking the phrase "to the Commission" from the statutory definition. That is impermissible. *See Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it.").

There are two fundamental reasons why this Court should apply the Act's plain text. First, the definition of "whistleblower" and the subsection of the anti-retaliation provision protecting internal complainants are not in conflict: when read together, the anti-retaliation provision

protects individuals who report information both to the SEC and to their employer and are retaliated against for making the internal report. Respondent, however, tries to flip this structure by using the *conduct* protected in the anti-retaliation provisions to define *who* is a protected whistleblower rather than using the unambiguous definition of "whistleblower" to identify who is protected.

Also, Respondent argues that a plain-text reading of the Dodd-Frank Act would leave auditors and lawyers without a remedy, as the Sarbanes-Oxley Act requires them to report securities violations internally before reporting to the SEC. But the assumption that auditors and lawyers would lack a remedy under the Act because retaliation would occur before they have an opportunity to report to the SEC is unfounded. Indeed, the allegations in *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2nd Cir. 2015), *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013) and other district court cases show that there often is an appreciable lag in time between an initial internal report and any retaliation. Moreover, auditors and lawyers are already protected from retaliation stemming from internal reports under the Sarbanes-Oxley Act. The Court should not seize on those small classes of claimants to justify the broad, counter-textual reading advocated by Respondent.

Second, Respondent's proposed interpretation undermines the Sarbanes-Oxley Act's administrative scheme, giving claimants who never reported to the SEC discretion and incentives to bypass Sarbanes-Oxley's procedures. The Sarbanes-Oxley Act requires claims to be filed with the U.S. Department of Labor ("DOL") before they may be brought before a district court, but the Dodd-Frank Act enables a plaintiff to file a complaint

directly in district court. Compounding the problem, plaintiffs are apt to forego the Sarbanes-Oxley Act and proceed under the Dodd-Frank Act under Respondent's interpretation because the Dodd-Frank Act provides for twice the amount of backpay as the Sarbanes-Oxley Act and offers a dramatically longer statute of limitations (up to 10 years) than the Sarbanes-Oxley Act (180 days). That plainly is not what Congress intended when it narrowly defined "whistleblower" in the Dodd-Frank Act and simultaneously amended several features of the more capacious Sarbanes-Oxley Act's regime. It would make no sense for Congress to retain a confined limitations period for Sarbanes-Oxley Act claims while simultaneously giving those same claimants—on the same facts—as many as 10 years to sue for the more generous relief available under Section 78u-6.

For these reasons, as discussed in greater detail below, the Chamber respectfully submits that the Court should apply the plain text of the Act.

ARGUMENT

I. The Dodd-Frank Act Unambiguously Requires That A Claimant Have Reported To The SEC To Qualify As A "Whistleblower" Protected By Section 78u-6's Anti-Retaliation Provision

A. The Plain Language Of Section 78u-6 Extends Protection From Retaliation Only To Individuals Who Report To The SEC

The Definition Of Whistleblower In Section 78u-6. The Dodd-Frank Act amended the Securities Exchange

Act of 1934 by adding 15 U.S.C. § 78u-6, which seeks to further enforcement of the securities laws by "motivat[ing] those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud," S. Rep. No. 111-176, at 110 (2010).

Section 78u-6, titled "Securities whistleblower incentives and protection," begins by stating that "*[i]n this section* the following definitions *shall* apply." 15 U.S.C. § 78u-6(a) (emphasis added). Section 78u-6(a) then defines "whistleblower" and uses that defined term throughout Section 78u-6, including the anti-retaliation provision.[2]

Section 78u-6(a) defines "whistleblower" as follows:

> [A]ny individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission.

Id. § 78u-6(a)(6) (emphasis added).

The foregoing plain language requires the Court to apply this statutory definition of "whistleblower" throughout Section 78u-6.

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2. *See* 15 U.S.C. §§ 78u-6(a)(3)(A)-(C), (a)(5), (b)(1), (c)(1)(B)(i)(I)-(III), (c)(2)(A)-(D), (d)(1), (d)(2)(A)-(B), (e), (g)(2)(A), (g)(5)(A) & (E), (h)(2)(A), (h)(3), & (i).

The Bounty Program In Section 78u-6(b). Within Section 78u-6, the Dodd-Frank Act first creates a bounty award program through which "whistleblowers who voluntarily provided original information to the Commission" can receive between 10 percent and 30 percent of the sanctions recovered by the SEC based on the whistleblower's tip. *Id.* § 78u-6(b). More specifically, Section 78u-6(b) provides:

> In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more *whistleblowers who voluntarily provided original information to the Commission* that led to the successful enforcement of the covered judicial or administrative action, or related action[.]

Id. § 78u-6(b)(1) (emphasis added).

The Anti-Retaliation Protections In Section 78u-6(h). Then, Section 78u-6(h), titled "Protection of whistleblowers," creates protections against retaliation for "whistleblowers," stating:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a *whistleblower* in the terms and conditions of employment because of any lawful act done by the *whistleblower* –
>
> (i) in providing information to the Commission in accordance with [Section 78u-6];

> (ii) [for participating] in any investigation or judicial or administrative action of the Commission [that is related to such information]; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7201, *et seq.*), this chapter, including section 78j-1(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Id. § 78u-6(h)(1)(A) (emphasis added).

The definition of "whistleblower" and the anti-retaliation provision should be read together in harmony. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.") (internal citations omitted); *Maracich v. Spears*, 133 S. Ct. 2191, 2205 (2013) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory . . . . [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.") (alteration and omission in original) (citing A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012)).

Together, these provisions recognize that employees who report to the Commission may engage in other, related actions for which they will also be protected: an

employee who has made a report to the Commission may be called to testify or assist an investigation related to that information, or may raise the same issue with her employer or exercise other related rights or responsibilities. That employee is protected from retaliation for all these activities, not merely in connection with her initial report.

That employee, however, must be a Dodd-Frank Act "whistleblower." The statute includes an explicit definition" of "whistleblower"—an individual who provides information "to the Commission"—and this Court "must follow that definition." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000); *see also Burgess v. United States*, 553 U.S. 124, 129 (2008) ("Statutory definitions control the meaning of statutory words").

The surrounding context confirms that the statutory definition of "whistleblower" applies to Section 78u-6(h). It is well established that "'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (citing *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947)). The section here is titled "Securities whistleblower incentives and protection," and the relevant subsection is titled, "Protection of whistleblowers." Congress used the term "whistleblower" throughout Section 78u-6, and the Court must give that language effect.

Although this natural and straightforward reading of the Act shows that the "whistleblower" definition in Section 78u-6(a)(6) establishes *who* is protected and the anti-retaliation provision in Section 78u-6(h)(1)(A)

specifies what *actions* taken by that covered person are protected, Respondent tries to flip this structure, using the conduct that is protected to create new definitions of who is protected. But that approach renders the definition of "whistleblower" that Congress created meaningless. As the Fifth Circuit explained:

> Under Dodd-Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC. The three categories listed in subparagraph § 78u-6(h)(1)(A) represent the protected activity in a whistleblower-protection claim. They do not, however, define which individuals qualify as whistleblowers.

Asadi, 720 F.3d at 625.

Moreover, Respondent's approach reads the words "to the Commission" in the definition of "whistleblower" out of the statute, thus violating the canon of statutory interpretation that no words in a statute shall be treated as superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

B. The Legislative History Confirms The Plain Meaning Of The Statute

The Dodd-Frank Act's legislative history confirms that Section 78u-6 extends protection from retaliation only to individuals who report to the SEC. The House bill initially prohibited retaliation against an "employee, contractor, or agent," but this later was replaced with the narrower prohibition on retaliation against a "whistleblower" that now appears in the Act. *Compare* Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7203(a)(g)(1)(A) (1st Sess., as passed by House, Dec. 11, 2009), *with* Restoring American Financial Stability Act of 2010, H.R. 4173, 111th Cong. § 922(a)(h)(1)(A) (2nd Sess., as passed by Senate, May 20, 2010). Had Congress selected the terms "individual" or "employee," then the construction Respondent advances would follow more naturally because the use of such broader terms would indicate that Congress intended any individual or employee—not just those who qualify as a "whistleblower"—to be protected from retaliatory actions by their employers. *See Asadi*, 720 F.3d at 626-27. But Congress used the term "whistleblower" throughout Section 78u-6 and that purposeful language should be given effect. *Id.*[3]

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3. It is useful to compare the Dodd-Frank Act's whistleblower provision to the Sarbanes-Oxley Act's whistleblower provision. The Sarbanes-Oxley Act prohibits an employer from "discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], or in any other manner discriminat[ing] against an *employee* in the terms and conditions of employment" because of the employee's involvement in certain enumerated protected activities. 18 U.S.C. § 1514A(a) (emphasis added). It is telling indeed that Congress used the term "employee" in the Sarbanes-Oxley Act, while using the limited definition of "whistleblower" in the Dodd-Frank Act.

Further, Congress's use of express language protecting employees who report only to their employer in other sections of the Dodd-Frank Act cautions against interpreting Section 78u-6 to protect such individuals. Title X of the Act, which creates the Consumer Financial Protection Bureau, prohibits an employer from terminating or discriminating against a "covered employee" who has "provided . . . information to the *employer*, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency relating to any violation of . . . any rule, order, standard, or prohibition prescribed by the Bureau." 12 U.S.C. § 5567(a)(1) (emphasis added). The fact that Congress used express language protecting employees who report only to their employer in Title X shows that Congress knows how to protect those individuals when it so desires. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) ("[W]hen 'Congress includes particular language in one section of a statute but omits it in another[,]' . . . this Court 'presume[s]' that Congress intended a difference in meaning.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

C. The Court Should Reject The Arguments Advanced By The Second Circuit And The Ninth Circuit

The Second Circuit and the Ninth Circuit advanced a number of justifications for not following the plain text. None of those arguments is persuasive.

First, the lower courts believed that applying the statute's plain terms would leave paragraph (iii) of Section 78u-6(h)(1)(A) with an extremely limited scope, undermining Congress's goal of fostering internal

complaints. This concern is misplaced. Under the statute's plain terms, a whistleblower is protected under paragraph (iii) when he: (1) reports to the SEC, then reports internally and is fired for the internal reporting; (2) simultaneously reports both to the SEC and internally and is fired for either disclosure; or (3) reports internally, then reports to the SEC, then is fired for the internal reporting.

The coverage provided by the Act's plain language in these circumstances cannot be dispelled by the Second Circuit's and Ninth Circuit's speculation that "[e]mployees are not likely to report in both ways, but are far more likely to choose reporting either to the SEC or reporting internally." *See Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045, 1049-50 (9th Cir. 2017); *see also Berman*, 801 F.3d at 152 ("[A]part from the rare example of simultaneous (or nearly simultaneous) reporting of wrongdoing to an employer and to the Commission, there would be virtually no situation where an SEC reporting requirement would leave subdivision (iii) with any scope.").

In fact, highly reliable empirical evidence shows that employees often advance complaints through multiple avenues. Data from the Ethics Resource Center National Business Ethics Survey of the U.S. Workforce indicates that approximately 84 percent of whistleblowers who report a complaint outside of the company do so after reporting internally first. Ethics Resource Center, *Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey* 2 (2012). In these and similar circumstances, paragraph (iii) spares courts the trouble of divining whether it was the report to the SEC or the internal complaint that prompted any retaliatory action—if the employee is a statutory

"whistleblower," he is protected regardless which specific complaint prompted the action.[4]

Second, the lower courts relied on *King v. Burwell*, 135 S.Ct. 2480 (2015), for the proposition that "[t]he use of a term in one part of a statute 'may mean [a] different thing[]' in a different part, depending on context." *See Somers*, 850 F.3d at 1049 (quoting *King*, 135 S. Ct. at 2493 n.3); *Berman*, 801 F.3d at 150. But the question presented in this case is not whether one "part" of a statute means the same thing "in a different part" or a "later . . . provision." Rather, it is whether a statutory definition that Congress said "shall apply" in Section 78u-6 applies to a provision falling squarely in that section.

Moreover, applying *King* in the manner suggested by the lower courts would yield a potentially chaotic approach to statutory interpretation, as it would enable courts to rewrite statutory definitions. The dissent in *Somers* warned of this risk in vivid terms. *See Somers*, 850 F.3d at 1051 (Owens, J., dissenting) ("In my view, we should quarantine *King* and its potentially dangerous shapeshifting nature to the specific facts of that case to avoid jurisprudential disruption on a cellular level.").

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4. SEC regulations prevent the Commission from revealing the identity of a whistleblower absent narrow extenuating circumstances (17 C.F.R. Part 240.21F-7 (2011)), and nearly a quarter of all award recipients reported to the SEC anonymously through counsel, U.S. Securities and Exchange Commission, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 18 (2016). Accordingly, it will often be easier for employees to show that an internal complaint pursuant to paragraph (iii) prompted the allegedly retaliatory action.

Finally, the lower courts claimed that Petitioner's interpretation would leave auditors and lawyers without a remedy, as they are required by the Sarbanes-Oxley Act to report securities violations internally before reporting to the SEC. *See Somers*, 850 F.3d at 1049-50; *Berman*, 801 F.3d at 151-52. This argument is unavailing for several reasons.

As an initial matter, the assumption that auditors and lawyers would lack a remedy under the Act because retaliation would occur before they have an opportunity to report to the SEC is unfounded. The allegations in *Berman* and *Asadi* show that there often is an appreciable lag in time between an initial report and the alleged employment retaliation. In *Berman*, nearly eight months elapsed between the plaintiff's internal complaint and the termination of his employment. *See Berman v. Neo@ Ogilvy LLC*, No. 14-cv-00523, 2014 WL 6865718, at *2-3 (S.D.N.Y. Aug. 15, 2014). And in *Asadi*, approximately one year passed between the plaintiff's internal complaint and the termination of his employment (although plaintiff received a negative performance review in the interim period). *See Asadi*, 720 F.3d at 621. District court cases addressing this issue have involved similar delays. *See, e.g., Dressler v. Lime Energy*, No. 14-cv-07060, 2015 WL 4773326, at *1-2 (D.N.J. Aug. 13, 2015) (plaintiff was not terminated until well over a year after her initial report); *Egan v. TradingScreen, Inc.*, No. 10-cv-8202, 2011 WL 4344067, at *1 (S.D.N.Y. Sept. 12, 2011) (plaintiff was not allegedly retaliated against until nearly eight months after his initial report); *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 647-648 (E.D. Tenn. 2015) (plaintiff was not allegedly retaliated against until nearly six months after the company began to suspect that he was reporting externally).

Moreover, lawyers and auditors are not left without protection for internal reporting because they are protected by the Sarbanes-Oxley Act. As the dissent in *Berman* observed, "Congress may well have considered that additional incentives should not be offered to get lawyers and auditors to fulfill existing professional duties, for the same reason reward posters often specify that the police are ineligible." *Berman*, 801 F.3d at 159 (Jacobs, J., dissenting). Lawyers and auditors account for a small portion of Sarbanes-Oxley whistleblower cases; the Court should not seize on those small classes of claimants to justify the broad, counter-textual reading advocated by Respondent.

D. The Court Should Not Defer To The SEC's Rule

In May 2011, the SEC issued regulations implementing the Dodd-Frank Act's whistleblower provision, which provide that individuals are protected under the Act's anti-retaliation provision even if they do not report to the SEC. 17 C.F.R. Parts 240.21F-1-17 and 249.1800-1801. And in August 2015 (while *Berman* was pending before the Second Circuit), the SEC issued interpretive guidance reiterating its position that individuals who have not reported to the SEC are covered by the Act's anti-retaliation provision. 17 C.F.R. Part 241. Despite Section 78u-6's straightforward text, Respondent contends that under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), this Court should defer to the interpretation set forth in the SEC's rule. This argument fails for multiple reasons.

The SEC's rule is due no deference because "Congress has directly spoken to the precise question at issue," so this Court "must give effect to the unambiguously

expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). As explained above, the plain meaning of the Act is that to be a "whistleblower" protected from retaliation for the disclosures listed in paragraph (iii), an individual must report a violation "to the Commission." 15 U.S.C. § 78u-6(a)(6).

Moreover, even if the statute were ambiguous, the Court should not give *Chevron* deference to the interpretation in the SEC's rule. *First*, courts defer to an agency's interpretive discretion only "when an agency recognizes that the Congress's intent is not plain from the statute's face," and therefore purports to exercise interpretative discretion. *See Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006); *see also Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002). But in promulgating the rule here, the SEC never purported to exercise its discretion to resolve a statutory ambiguity. Instead, it justified its action by stating that the Dodd-Frank Act's anti-retaliation provision "expressly protec[ts]" internal whistleblowing. 76 Fed. Reg. 34,300, 34,304 n.38 (June 13, 2011); *see also id.* at 34,304 (referring to "the fact that . . . [paragraph (iii)] includes individuals who report to persons or governmental authorities *other than the Commission*.") (emphasis in the original). The SEC cannot claim deference to interpretative discretion that it never exercised.

Second, an agency interpretation receives *Chevron* deference only when it is "reasonable." *Chevron*, 467 U.S.

at 845. Here, the SEC's rule is unreasonable because the SEC substituted Congress's definition of "whistleblower" with a different definition of its own design. "For purposes of the anti-retaliation protections" of the Dodd-Frank Act, the SEC's rule states, "you are a whistleblower if . . . [y]ou provide . . . information in a manner described" in the anti-retaliation provision itself. 17 C.F.R. Part 240.21F-2(b)(1). Congress has already defined "whistleblower," however, and the SEC had no authority to give that statutory term a different meaning.

II. Broadening Section 78u-6 Beyond Its Statutorily Prescribed Limits Would Undermine The Anti-Retaliation Provisions Of The Sarbanes-Oxley Act

Less than ten years before enacting the Dodd-Frank Act, Congress passed the Sarbanes-Oxley Act, a comprehensive regime to protect internal whistleblowers. In the Sarbanes-Oxley Act, Congress authorized employees to file a complaint with the U.S. Department of Labor ("DOL") if they believe they have suffered retaliation for reporting, internally or externally, mail fraud, wire fraud, bank fraud, securities fraud, a violation of any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)-(b). The complaint is investigated by the Occupational Safety and Health Administration ("OSHA"), which renders findings and may order reinstatement of an employee who has been improperly removed from his or her position. 18 U.S.C. §§ 1514A(b)(2)(A), (c)(2)(A); 29 C.F.R. Parts 1980.104-105.

Either party may appeal OSHA's decision to an Administrative Law Judge ("ALJ"), who will permit

discovery, conduct a bench trial, and issue a decision that may be appealed to the Administrative Review Board ("ARB"). 29 C.F.R. Parts 1980.106, 107, 109, 110. An ARB decision may be appealed to a federal court of appeals. 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(4)(A). If a final DOL decision does not issue within 180 days of the employee's initial complaint, the complainant has the option of removing the case to a federal district court, where he may proceed *de novo*. 18 U.S.C. § 1514A(b)(1)(B).

The Sarbanes-Oxley Act's regime imposes important constraints. It provides for initial investigation by the DOL, which can lead to the prompt termination of baseless claims. Resolution within the DOL is the preferred outcome, although complainants may "kick-out" the case to federal court in certain circumstances. 18 U.S.C. § 1514A(b)(1)(B). The limitations period is short—the Sarbanes-Oxley Act prescribed a 90-day limitations period, which the Dodd-Frank Act extended to 180 days. 18 U.S.C. § 1514A(b)(2)(D); *see* Pub. L. No. 111-203, § 922(c)(1)(A)(i), 124 Stat. 1376, 1848 (2010). Monetary relief is limited to compensatory damages, which may include backpay, litigation costs, and reasonable attorneys' fees, § 1514A(c)(2)(B)-(C).

If claimants may proceed under the Dodd-Frank Act's whistleblower provision even when they do not meet its definition of "whistleblower," there will be a proliferation of whistleblower litigation under the Dodd-Frank Act, and the strictly circumscribed scheme of the Sarbanes-Oxley Act will be undermined. As a matter of practical and economic reality, plaintiffs would be far more likely to invoke the Dodd-Frank Act than the Sarbanes-Oxley Act for three reasons.

First, whistleblowers who allegedly experience retaliation in violation of the Dodd-Frank Act may sue as many as 10 years after the retaliatory action (15 U.S.C. § 78u-6(h)(1)(B)(i)), (h)(1)(B)(iii)), whereas the Sarbanes-Oxley Act has a 180-day statute of limitations (18 U.S.C. § 1514A(b)(2)(D)). Second, while the Sarbanes-Oxley Act provides for a single backpay award (*id.* at § 1514A(c)(2)(B)), the Dodd-Frank Act provides for double backpay (15 U.S.C. § 78u-6(h)(1)(C)(ii)). Third, under the Sarbanes-Oxley Act, a complainant must proceed before OSHA, an ALJ, and the ARB before heading to the court of appeals—a more costly and time-consuming endeavor than proceeding under the Dodd-Frank Act.

Although the Sarbanes-Oxley Act provides for emotional distress damages, those awards are usually much lower than backpay awards, and again, Dodd-Frank backpay awards are doubled. As a general matter, an award of $75,000 is at the high-end of emotional distress awards in a Sarbanes-Oxley Act whistleblower retaliation case. *See Maverick Transp., LLC v. Dep't of Labor*, 739 F.3d 1149, 1157-58 (8th Cir. 2014). By contrast, backpay damages in whistleblower retaliation actions are often much higher. *See, e.g.*, Final Verdict Form at 4, *Wadler v. Bio-Rad Labs., Inc.*, No. 15-cv-2356 (N.D. Cal. Feb. 6, 2017), ECF No. 223 (awarding millions in backpay damages but zero dollars in emotional distress damages); *Gunther v. Deltek, Inc.*, ALJ No. 2010-SOX-00049, 2013 DOLSOX LEXIS 35, at *78-81, 95-97 (Dep't of Labor June 5, 2013) (allowing the complainant to recover over $500,000 in backpay, lost bonuses and other lost benefits, but awarding only $10,000 for emotional distress), *aff'd*, ARB Nos. 13-068, 13-069, 2014 WL 7227263 (Dep't of Labor Nov. 26, 2014), *aff'd*, *Deltek, Inc. v. Dep't of Labor*,

649 Fed. App'x. 320 (4th Cir. 2016). As a result, plaintiffs will be far more likely to pursue claims under the Dodd-Frank Act than the Sarbanes-Oxley Act regardless of whether they may obtain emotional distress damages under the latter.

That plainly is not what Congress intended when it narrowly defined "whistleblower" in the Dodd-Frank Act and simultaneously amended several features of the more capacious Sarbanes-Oxley Act's regime. It would make no sense for Congress to retain a confined limitations period for Sarbanes-Oxley Act claims, while simultaneously giving those same claimants—on the same facts—as many as 10 years to sue for the more generous relief available under Section 78u-6. *See Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) ("We resist a reading of [a statute] that would render superfluous an entire provision passed in proximity as part of the same Act."); *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010) ("[T]he canon against interpreting any statutory provision in a manner that would render another provision superfluous . . . applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times." (internal citation omitted)).

Moreover, construing the Dodd-Frank Act to provide a cause of action for a violation of the Sarbanes-Oxley Act without an exhaustion of administrative remedies requirement deprives employers of the considerable benefits that the Sarbanes-Oxley Act's administrative scheme provides, as proceeding through the DOL fosters early settlements and dismissals. *See* Occupational Safety and Health Administration, CPL 02-03-007, *Whistleblower Investigations Manual* 6-12 to -13 (2016) ("Voluntary

resolution of disputes is often desirable, and investigators are encouraged to actively assist the parties in reaching an agreement, where appropriate. It is OSHA policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. Furthermore, at any point prior to the completion of the investigation, OSHA will make every effort to accommodate an early resolution of complaints in which both parties seek it.").

III. Respondent's Assertion That The Chamber Has Taken Inconsistent Positions Is Meritless

Lastly, Respondent argues that the Chamber's position in this case is inconsistent with the position it took in a December 17, 2010 comment letter addressing the SEC's proposed rules for implementing the Dodd-Frank Act's whistleblower provision. (Resp't's Opp'n Cert. at p. 17, n.11). This claim is meritless.

The SEC's proposed rules gave no notice that it intended to expand the meaning of "whistleblower" as used in the anti-retaliation provision, and the Chamber therefore did not have an occasion in its comment letter to address the question presented in this case. Instead, the SEC requested comments on whether it should require whistleblowers to use available internal reporting systems as a condition of award eligibility under the Dodd-Frank Act's bounty program. The Chamber's comments urged the SEC to adopt such a rule. As the Chamber explained, "[c]onditioning an award on appropriate utilization of internal reporting processes would provide a strong incentive for whistleblowers to report internally, which would enable companies to continue to receive essential information about potential misconduct necessary to

maintaining robust corporate compliance programs." *See, e.g.*, Comment Letter from Chamber *et al.* to Secretary Murphy, at 4-5, 15 (Dec. 17, 2010), https://www.sec.gov/comments/s7-33-10/s73310-189.pdf. The Chamber advocated for internal reporting before an individual reports to the SEC, not *instead* of reporting to the SEC.

Moreover, Petitioner's position that Section 78u-6 extends protection from retaliation only to individuals who report to the SEC will not discourage internal reporting. As data from the Ethics Resource Center demonstrates, the vast majority of employees will continue to report internally. *See* Ethics Resource Center, *Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey* 2 (2012) (84 percent of whistleblowers who report a complaint outside of the company do so after reporting internally first). The only effect of ruling in favor of Petitioner would be to discourage otherwise meritless retaliation claims.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the Court reverse the decision of the Ninth Circuit Court of Appeals.

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